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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 196

IRWIN FRUCHTMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Irwin Fruchtman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction entered against him in the United States District Court for the Northern District of Ohio, Western Division. Petitioner was convicted on one count of conspiracy to violate the "Obstruction of Proceedings" statute, 18 U.S.C. § 1505, and on one count of violating of that statute.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. 1a)

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1970 (App. 7a) Petition for rehearing was denied on March 31, 1970. (App. 7a) On April 14, 1970, Mr. Justice Potter Stewart extended the filing time to and including May 29, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a trial court ever direct a verdict on an essential element of the offense, however undisputed the facts bearing upon that element may appear to be? There is a conflict among the Circuits.

2. When does an amendment to an indictment amount to more than a "matter of form" under *Russell v. United States*, 369 U.S. 749, 770 (1962), and thereby violate the Fifth Amendment right to be tried only upon the indictment returned by the grand jury? What function, if any, has Rule 7(c) of the Federal Rules of Criminal Procedure in assessing the constitutional import of amendments made in the factual allegations of an indictment?

3. In what circumstances is a suppression hearing mandatory under Rule 41(e) of the Federal Rules of Criminal Procedure to determine a claim that administrative process has been abused to obtain evidence for a criminal prosecution?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment:

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1505 provides in part:

"Whoever corruptly, or by threats or force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

* * *

"Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States; or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—"

"Shall be fined not more than $5000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner was convicted by a federal jury of conspiring to violate and of violating 18 U.S.C. § 1505. That statute makes criminally liable anyone who: "in any *proceeding* pending before any department or agency of the United States" (emphasis supplied) "obstructs, or impedes, or endeavors to . . . obstruct, or impede the due and proper administration of the law under which such *proceeding* is being had before such department or agency. . . ." (emphasis supplied) The first question presented concerns the proper distribution of functions, as between judge and jury, in deciding whether there was a "proceeding" pending subject to alleged obstruction.

The FTC "proceeding" alleged to underlie petitioner's conviction was, in the parlance of the FTC itself, a "preliminary spot check". (J. App. 647-50, 292-93.) Unlike formal FTC investigations, 15 U.S.C. § 49, this "preliminary spot check" was not begun by order or resolution of the Commission; no complaint was served on petitioner; no subpoenas were issued; and no testimony was taken under oath. (J. App. 287, 292-3.) Joseph G. Smeraldi, Assistant Attorney in charge of the Cleveland office of the FTC, conducted the "check" by visiting the McLouth Corporation in Detroit and petitioner's Donovan Wire & Iron Company in Toledo (J. App. 225-6, 254.)

The Donovan Company processes, warehouses and distributes steel. (J. App. 510-11) As part of its business, Donovan purchased steel for resale from the McLouth Corporation. At times, McLouth would sell steel to Donovan at a discount. (J. App. 409-10) In 1962, Smeraldi visited Donovan as part of an investigation of McLouth's discount practices (J. App. 225-26,

254-55) He had learned at McLouth that it was the understanding of that company that the discount steel was to be exported by Donovan. (J. App. 247-48, 250-51) Smeraldi's trial testimony was that he visited Donovan to check on whether the steel had been exported because, if so, that would end his investigation. (J. App. 588)

At Donovan he saw some documents reflecting real transactions, showing that steel had been both sold and, in fact shipped, domestically. (J. App. 362-63; Exhs. 106-48) Smeraldi also saw, however, other documents that indicated foreign sales of steel, although they did not show that the steel had actually been exported. As petitioner readily admitted at trial, these documents were fictitious in that they did not reflect actual transactions. (J. App. 172, 534-35, 562-63)

The conflict at trial concerned whether petitioner had explained to Smeraldi at the time that the documents purporting to show foreign sales were fictitious. Petitioner testified that he had advised Smeraldi that they were typical of the devices Donovan had to invent, for a lawful business purpose, to keep the discounts secret from others in the steel industry who might take reprisals against any deviation from a uniform price. (J. App. 527-29; 538-41) The jury believed Smeraldi, however, that he had never been so advised, and that, relying upon indications of exportation, he had recommended to the FTC that the investigation proceed no further. (J. App. 275-76, 312)

At the close of the Government's case, the court denied a motion for judgment of acquittal that was based in part upon the ground that a "preliminary spot check" of the kind described is insufficient, as a matter

of law, to establish the existence of a "proceeding". The motion had argued the protection afforded "proceedings" by 18 U.S.C. § 1505 does not operate until the agency process progresses beyond the informal stage and into a stage of some juridical character. Other criminal statutes amply protect early stages such as the "spot check" involved here. 18 U.S.C. § 1001, 15 U.S.C. § 50.

In denying that motion, the court did not define what minimum degree of formality a field investigation must have to rise to the dignity of a Section 1505 "proceeding". (J. App. 47-55) But whatever the legal definition, the jury question still remained whether there were facts in this case sufficient to satisfy the legal requirement. Accordingly, the defense submitted an instruction that would have permitted the jury to perform its traditional function in assessing whether such facts as were legally necessary were actually proved by the evidence. (J. App. 621) This requested instruction was rejected (J. App. 582). Instead, the court took the factual issue from the jury altogether by charging that the "investigation . . . *was* a proceeding . . . as the word proceeding is used in Section 1505." (J. App. 609) (emphasis supplied) The defense excepted to this charge on the ground that it was a finding by the court "as a matter of law, there is a proceeding . . . .", (J. App. 615, 72, 74-5). The court had thereby directed a verdict on an essential element of the offense. In an opinion denying petitioner's post-trial motions, the court upheld its preemption of the jury function by characterizing the factual aspect of the "proceeding" issue as "undisputed". (J. App. 96)

The Court of Appeals held that the trial court had indeed charged that the investigation "was a 'proceed-

ing' ". (App. 3a) But it found "no error" in that charge, stating only what petitioner had never disputed: "The *definition* of 'proceeding' as used in the statute was a question of law to be determined by the court rather than the jury." (App. 3a) (emphasis supplied)

With respect to the second question presented, the indictment was amended twice during trial to change its factual allegations as to the subject matter of Smeraldi's investigation. (J. App. 56, 117-121, 127-133, 135-38, 163-67) The details are presented at pp. 10-12 *infra*.

The facts pertinent to the third question presented appear, under seal, in typewritten form along with the argument for granting the writ on that point. Protective orders entered below, relief from which was denied by Mr. Justice Brennan on May 12, 1970, require that form of submission.

REASONS FOR GRANTING THE WRIT

1. Directing a Verdict on an Element of the Offense—a Conflict in the Circuits

When the trial court ruled that the Government's evidence of a "proceeding" was sufficient in law, its denial of the motion for acquittal decided only that *if* a jury accepted that evidence beyond a reasonable doubt, an essential element of the crime had been proved. The court's charge that Smeraldi's "investigation . . . was a proceeding" (J. App. 609), however, removed the factual assessment from the jury's province. It thereby impermissibly directed a verdict on an essential element, in violation of the right to a jury trial "no matter how conclusive the evidence". *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947).

In its post-trial opinion, the trial court found authority for its preemption of the jury function in Sixth Circuit opinions, holding that when "a fact is not made an issue by defendant and it is shown without controversy by the evidence, the trial judge does not commit reversible error in stating that fact to the jury." *Malone* v. *United States*, 238 F.2d 851, 852 (6th Cir. 1956). See also *Schwachter* v. *United States*, 237 F.2d 640, 644 (6th Cir. 1956) This rule is law as well in the Fourth and Ninth Circuits. *United States* v. *Sullicy*, 360 F.2d 699, 703 (4th Cir. 1966); *Guy* v. *United States*, 336 F.2d 595, (4th Cir. 1964); *Lyons* v. *United States*, 325 F.2d 370, 375 (9th Cir. 1964). Ironically, in this case the defense had cross-examined Smeraldi at length to contest that he had conducted a "proceeding" (J. App. 286-93, 342-24) But even if the defense had left the matter uncontested, petitioner contends that a trial court may never deprive the jury of its fact-finding function on an essential element.

The First Circuit, squarely in conflict with this case, fully acknowledges that feature of the jury trial right. *DeCecco* v. *United States*, 338 F.2d 797 (1st Cir. 1964). DeCecco had been charged with failure to pay the "wagering" tax. He put on a defense "but none to the effect that he had paid the tax." *Id.* at 797. On the ground that the evidence of nonpayment was "undisputed", the trial court refused to permit the jury to consider the issue. Judge Aldrich, writing for the Court of Appeals, reversed and wrote:

> "No matter how persuasive the government's evidence may seem to the court, there is no burden on a defendant to dispute it. Nor can a defendant's failure to offer evidence on one issue change or satisfy the government's burden with respect to it . . . [citations]. The court's charge in this

> case, if correct, would mean that if a defendant rests at the close of the government's case, the burden on all matters is on the government, but that if he offers evidence on some issues he admits one on which he does not. This would require a defendant to offer partial evidence at his peril. . . . It may have seemed to the district court, and seems to us, highly unlikely that the government's case would founder on the issue of nonpayment of the tax, but it was the defendant's right to insist on its incurring that risk however small." *Id.* at 798.

In that holding, the First Circuit is joined by the Third, Fifth and Seventh. *United States* v. *Manuszak*, 234 F.2d 421, 242-25 (3rd Cir. 1956); *United States* v. *Roe*, 287 F.2d 435, 440 (5th Cir. 1961) and *United States* v. *England*, 347 F.2d 425, 431 (7th Cir. 1956).

Since the conflict is vivid and has ripened among various circuits, it is time for this Court to settle the law on an important issue in the distribution of fact-finding functions between judge and jury.

2. Unlawful Indictment Amendments

From as early as 1887 in *Ex Parte Bain*, 121 U.S. 1 to as recently as 1962 in *Russell* v. *United States*, 369 U.S. 749, this Court has steadfastly held that:

> "*To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury* at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to the grand jury which indicted him. . . .
>
> "This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission

> to the grand jury, *unless the change is merely a matter of form.*" *Russell* v. *United States, supra* at 770. (emphasis supplied)

This case illustrates the prohibited guessing game. At trial the grand jury's *allegations of fact* were amended in much more than a formal manner. And it was an amendment process that did not end until the Government had been allowed two guesses "as to what was in the minds of the grand jury".

The grand jury's indictment charged petitioner with conspiring to submit and submitting fictitious documents:

> "to Joseph G. Smeraldi, whom [he] knew to be an agent of the Federal Trade Commission conducting an investigation of possible violations of Title 15, United States Code, *Section 13a* . . .". (emphasis supplied) (J. App. 12)

"Section 13a" is thus a factual allegation of the indictment describing the "subject under inquiry" to which the fictitious documents were allegedly "pertinent". *Cf. Russell* v. *United States*, 369 U.S. 749, 756, 758-59.

The trial amendments were performed upon the "13a" allegation. The first amendment took place after the impaneling of the jury and the Government's opening statement. When the opening statement disclosed that the Government would offer proof pertaining to an investigation into violations of a statutory provision different from Section 13a, the defense moved to strike that part of the opening statement and to limit the Government to proof pertinent to the investigation alleged by the grand jury. (J. App. 117-121) The court denied that motion and invited the Government to amend the indictment. (J. App. 127-133)

The Government stated that there "couldn't possibly have been" an investigation into violations of Section 13a, and moved to amend by deleting the letter "a" from wherever it appeared in the indictment following the number "13". (J. App. 135, 136) This motion was granted. (J. App. 137-38) The amendment thus redefined the subject of Smeraldi's investigation as an inquiry into possible violations of Section 13. Section 13, containing subsections (a) through (f), is a wholly separate section of Title 15 from Section 13a. One pertinent difference between them is that Section 13a contains no language exempting exported goods from its regulatory impact. Accordingly, if the FTC investigation was into possible violations of Section 13a, as the grand jury had alleged, the documents suggesting exportation would not have terminated Smeraldi's "spot check". For the allegedly obstructing documents would not have been "pertinent" to the subject "then under inquiry". Nonetheless, although the defendant —upon the evidence outlined in the opening statement—would have been acquitted of the grand jury's charge, the court ruled in an oral opinion that this first amendment was permissible under *Russell* for it involved only "a matter of form".[1] (J. App. 127-32, 137)

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[1] The Government all but conceded that it could not prove a 13a investigation (J. App. 135, 136). Judgment of acquittal would have been proper upon that concession. "It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end." *United States* v. *Dietrich*, 126 Fed. 676, 677-78 (C.C., D. Neb. 1904) (per Cir. J., later Mr. Justice, Van DeVanter). Accord: *McGuire* v. *United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States* v. *Maryland Cooperative Milk Producers*, 145 F. Supp. 151 (D.D.C. 1956). At the least, the proper course was to have granted the defense motion to strike the offending parts of the Government's opening and to limit proof to the facts charged by the grand jury. Thus limited, Smeraldi's trial testimony would have required a judgment of acquittal at the close of the Government's case.

The trial continued and testimony was taken under the indictment so amended. (J. App. 138-163).

Overnight, however, the Court wondered whether the Government's first guess might not have resulted in more than an amendment "of form". The new charge alleged an investigation geared to the whole of Section 13, which contains subsections (a) through (f). In another oral opinion, the Court stated that it had "granted this requested and seemingly broader amendment". (J. App. 164) In addition to the principal broadening that rendered evidence of export "pertinent", the various subsections of Section 13 cover a wide variety of discriminatory conduct, much of which is not embraced by Section 13a.[2] Accordingly, the Court invited yet another Government speculation "as to what was in the minds of the grand jury". 369 U.S. at 770.

This time, the Government obtained an amendment resulting in the charge that the defendant knew Smeraldi to be investigating possible violations of subsection (a) of Section 13 (J.App. 165, 167, 56). And the petit jury returned its verdict upon the indictment in this form (J.App. 606-08). Significantly, the latest amendment left standing the principal difference between the grand jury's charge and the earlier version: evidence of export, immaterial to the 13a investigation charged by the grand jury, was now critical to the 13(a) investigation considered by the petit jury.

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[2] For example, subsection (c) of Section 13 proscribes the granting or receipt of "anything of value as a commission, brokerage, or other compensation . . . except for services rendered . . . ." Section 13a is limited (in its first clause) to "any discount, rebate, allowance, or advertising service charge." On the other hand, Section 13a proscribes (in its third clause) sale of goods at "unreasonably low prices . . ." while section 13 has no such coverage.

Upon the foregoing facts, reversal is required by *Russell* v. *United States*, 369 U.S. 749 (1962). In *Russell*, the defendants were convicted of obstructing a Congressional subcommittee investigation by refusing to answer certain questions. But the statute required answers only if the question was "pertinent to the question then under inquiry" by the subcommittee. And the *Russell* indictments had failed to identify the subject of the investigation to which the questions were allegedly pertinent. Although the Government sought no "curative" amendment to define the subject, the relevant feature of *Russell's* holding is that any such amendment would have entailed more than a "matter of form".

The compelling applicability of *Russell* is manifest in the following hypothetical. Suppose the *Russell* indictments had specified a "question then under inquiry", but in the judgment of the Court or prosecutor, the returned indictment had misdescribed that subject. The *Fruchtman* indictment presents precisely that situation. It is plain that the *Russell* court would have not permitted an amendment to redefine the subject of the Congressional investigation. For whether by bill of particulars or otherwise, such an amendment would have allowed "the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment." 369 U.S. at 770.

The Court of Appeals acknowledged that the indictment here was amended at trial, but held the amendments no more than a "change of form". (App. 4a) The scope of the *Russell* exception is therefore directly presented for review here. That is a question of importance every time a post-grand jury change is made in a federal indictment.

Still another related question is presented by the disposition of the indictment amendments in the Court of Appeals. The Court buttressed its view that the changes here fall within the *Russell* exception by reference to Rule 7(c), Fed.R.Crim.P.[3] It held that under that Rule only a citation change had occurred which had not "misled or prejudiced" petitioner. (App. 3a-4a).

It is true that Rule 7(c) permits the court or prosecutor to correct errors or omissions "in the citation" where such corrections do not "mislead the defendant to his prejudice". But the "citation" to which the Rule has reference is clearly identified in the previous sentence. It is the "citation of the statute . . . which the defendant is alleged . . . to have violated"—in this case, 18 U.S.C. §1505.

When a change in the statutory citation to the charge on trial is effectuated, no violation of the Fifth Amendment is entailed by application of Rule 7(c). For the charging statute is selected by the prosecutor, not the grand jury, and it "constitutes no part of the indictment". *Williams* v. *United States*, 168 U.S. 382, 389 (1897).

The amendment in this case, however, was utterly unrelated to the citation of the statute alleged to have been violated. It happens that the amendment was

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[3] In relevant part the Rule reads:

". . . The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

made on a statutory citation. But that statutory citation was a shorthand way of alleging a fact critical to the grand jury's charge.

Where an indictment has been amended to change the *facts* alleged by the grand jury, the question of prejudicial misleading does not arise. To be sure, such an amendment prejudices, indeed abrogates the defendant's Fifth Amendment right to be tried *only* upon an indictment returned by a grand jury. But it is not a matter of whether the defendant has been misled. For example, although a defendant might not be misled if, sufficiently prior to trial, an indictment charging larceny of a coat were amended by the prosecutor to state facts charging larceny of a car, no one would contend that the Fifth Amendment right had not been abrogated.

By contrast, the question of *misleading* prejudice does arise when an indictment is challenged as impermissibly vague. But in that setting the indictment challenged as vague and misleading is the one returned by the grand jury unamended. The question then at issue is whether an indictment, in the form returned by the grand jury, is yet prejudicially defective for failure to fulfill its other functions: sufficiently informing the defendant of the charge and protecting against double jeopardy. *Russell* v. *United States*, 369 U.S. at 763-64.

Since the Court of Appeals, however, not only misapplied the *Russell* exception for "matters of form", but also used Rule 7(c) to engraft upon the Fifth Amendment yet another exception, its judgment doubly merits review in this Court.

3. When Is a Suppression Hearing "Mandatory"?

On May 12, 1970 Mr. Justice Brennan denied petitioner's motion for relief from protective orders entered by the courts below. The terms of those orders prevent disclosure *even to the defendant* of facts pertinent to this question. The facts and argument have therefore been submitted under seal, in typewritten form, in a document accompanying this petition.

CONCLUSION

For the foregoing reasons, and those submitted in connection with Question #3 under seal, the petition for a writ of certiorari should be granted.

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28 May 1970

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19248

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

IRWIN FRUCHTMAN, *Defendant-Appellant*.

ON APPEAL from the United States District Court of the Northern District of Ohio, Western Division

Decided February 9, 1970.

Before: WEICK, EDWARDS, and COMBS, Circuit Judges.

COMBS, Circuit Judge. The appellant, Irwin Fruchtman, was charged in a four-count indictment with two conspiracies and two substantive offenses growing out of his alleged interference with a Federal Trade Commission investigation of pricing practices in the steel industry. Counts III and IV were dismissed prior to trial. Count I charged a conspiracy to violate 18 U.S.C. § 1505,[1] and in

[1] 18 U.S.C. § 1505 in pertinent part provides: "Whoever corruptly, or by threats or force, or by threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, . . . ; or

* * * *

"Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

that count Louis E. Moultane and Milton S. Cohen were also named as defendants. Cohen was granted a severance and testified for the Government in the case against Fruchtman and Moultane; the indictment against him was dismissed after their trial. The court directed a verdict of acquittal as to Moultane at the close of the Government's evidence. The jury found Fruchtman guilty on the conspiracy count and also of the substantive offense charged in Count II. The court imposed sentences of a year and a day on each count to run concurrently and a fine of $10,000.

Fruchtman, at the time of his indictment, was vice president of Donovan Wire & Iron Company of Toledo, Ohio, a company which processes, warehouses, and distributes steel. During the years 1958 through 1962, Donovan purchased steel for resale from McLouth Steel Corporation, a Detroit steel producer, under a private discount arrangement.

In April, 1962, Joseph G. Smeraldi, assistant attorney in charge of the Cleveland office of the Federal Trade Commission, made an investigation of McLouth's discount practices, suspecting illegal price discrimination under the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). His investigation of McLouth revealed certain debit and credit memoranda in favor of Donovan for fictitious extra processing and freight equalization. Smeraldi then went to the Donovan plant in Toledo where he met with Fruchtman and asked to see all invoices showing purchases of steel by Donovan from McLouth during the years 1960-1962. Fruchtman complied by submitting, along with other records, false invoices purporting to show the sale of steel to Canadian companies. This steel had in fact been sold domestically. The discounts granted by McLouth to Donovan were not prohibited under the Clayton Act on steel destined for sale outside the United States.

There is testimony that prior to Smeraldi's visit Fruchtman had learned of the Federal Trade Commission investi-

gation and had directed Milton Cohen, Donovan's plant manager, to alter a batch of sales invoices by inserting the names of certain Canadian companies as the consignees for large quantities of steel. It is admitted that these invoices, which Fruchtman made available to Smeraldi, were false.

Based in part on his examination of the false invoices, Smeraldi reported there was no evidence of Clayton Act violations and the Federal Trade Commission closed its investigation.

Although the parties are in disagreement about the effect of the charge to the jury, we conclude from our examination of the record that the trial judge found that the investigation conducted by Smeraldi was a "proceeding" within the terms of 18 U.S.C. § 1505 and, in practical effect, so instructed the jury. We find no error on this score. The definition "proceeding" as used in the statute was a question of law to be determined by the court rather than the jury.

We also find no merit in appellant's contention that the word "proceeding" refers only to those steps before a federal agency which are juridical or administrative in nature. The trial judge correctly held that "proceeding" is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency. *Rice* v. *United States*, 356 F.2d 709, 715 (8th Cir. 1966); *United States* v. *Batten*, 226 F. Supp. 492 (D.C. D.C. 1964); *United States* v. *Blumfield*, 85 F. Supp. 696 (W.D. La. 1949).

At trial, the district judge permitted the Government to amend the indictment. The original indictment fairly stated the facts upon which the charges were based, but in describing the investigation conducted by Smeraldi it was erroneously stated that he was proceeding under Section 13a instead of Section 13(a) of Title 15, United States Code. Appellant has not demonstrated that he was misled or prejudiced by reason of the amendment. See *United*

States v. *Miller*, 366 F.2d 512 (6th Cir. 1966). The amendment was a non-prejudicial change of form and was properly permitted to be made. *Russell* v. *United States*, 369 U.S. 749, 770 (1962); Federal Rules of Criminal Procedure 7(c).

Appellant also raises a Jencks Act question. After Smeraldi and an agent for the Internal Revenue Service testified for the Government, appellant moved for production of all statements available to him under the Jencks Act, 18 U.S.C. § 3500. He requested in particular the handwritten notes of interviews conducted by these agents. Both Smeraldi and the IRS agent testified that their notes had been destroyed several months before trial. There was no evidence that they were destroyed to prevent their examination by appellant, and the reports which had been compiled from the handwritten notes were made available to appellant's counsel. Since it is not shown that the notes were destroyed for an ulterior purpose and the same information was available to appellant in the reports themselves, the trial judge correctly refused to strike the agents' testimony. *Killian* v. *United States*, 368 U.S. 231 (1961); *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959); *United States* v. *Greco*, 298 F.2d 247 (2nd Cir. 1965).

Appellant also contends that all evidence which was obtained directly or indirectly by reason of a tax investigation of the Donovan Company should have been suppressed because it was obtained through abuse of administrative summons by the IRS. This argument is premised on the fact that IRS developed the evidence which established the falsity of the Donovan invoices and recommended to the Department of Justice that Fruchtman be indicted. The records of Donovan were examined for income tax purposes in 1966. During the course of the tax investigation, the FTC file covering the Clayton Act investigation of McLouth and Donovan in 1962 was made available to IRS. This file contained copies of the false invoices which Fruchtman had furnished to the FTC attorney showing the sale of about

$3,000,000 worth of steel to Canadian companies. In order to determine whether these sales were actually made and income derived therefrom, IRS obtained statements from Moultane, president of McLouth, and two other McLouth officials pursuant to summons issued under 26 U.S.C. § 7602. A statement was also obtained from appellant Fruchtman but we understand that this was given voluntarily.

Appellant filed motion to suppress all evidence and leads obtained by IRS, relying on the line of cases of which *Abel v. United States*, 363 U.S. 217 (1960), and *Hinchcliff* v. *Clarke*, 371 F.2d 697 (6th Cir. 1967), are typical. These cases restate the recognized rule that an administrative summons may not be used for the purpose of gathering evidence in a criminal case. The motion to suppress was denied and it is argued by appellant that, at the very least, the court should have held a hearing to determine the merits of the motion. We disagree. A careful examination of the record, including Exhibit 18 which was prepared by an IRS agent for use within that organization, fails to reveal any abuse of process. IRS had the statutory right, in fact the duty, to make such investigation, using its summons power, as was necessary to develop the facts in regard to Donovan's civil tax liability. See *DiPiazza* v. *United States*, 415 F.2d 99 (6th Cir. 1969); *United States* v. *Michigan Bell Telephone Co.*, 415 F.2d 1284 (6th Cir. 1969); *Wild* v. *United States*, 362 F.2d 206 (9th Cir. 1966). So long as such investigation is confined within the limitations of the department's statutory authority, there is no prohibition against another department of government having the benefit of information developed in the IRS investigation. We do not find that the IRS investigation here exceeded the limits necessary to ascertain Donovan's tax situation.

The confidential IRS report (Exhibit 18) was submitted to the district judge by the Government for in camera inspection and he made it available to appellant's counsel under a protective order limiting its use by counsel to this

case only. Counsel was directed not to disclose this exhibit or to reveal its contents to appellant or to other counsel representing appellant in other proceedings. The district judge also directed that for the purpose of appeal access to Exhibit 18 would be granted only to counsel for appellant and counsel for the Government. Pending disposition of the appeal, this Court entered an order that Exhibit 18 would not be printed as part of the appendix but that copies of the document would be sealed in an envelope and filed by appellant with the clerk of this Court for the Court's in camera inspection. Our order also contained the same admonition to appellant's counsel about revealing the contents of the document to any other person, and further provided that briefs in which Exhibit 18 was discussed would be sealed by the clerk of this Court and marked for in camera inspection.

The Government requests that the terms of the protective order in regard to this document be continued in effect. This request is granted. Exhibit 18 makes reference to a related investigation now pending in IRS and obviously was prepared for the benefit of IRS personnel. Since the document has been made available to appellant's counsel for use in this case, appellant's rights have been fully protected. The terms of the protective order entered by the district court and by this Court will be continued in effect and the clerk of this Court will carry out this directive.

Finding no error prejudicial to appellant, the judgment is affirmed.

Judgment

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS
Clerk

Order

None of the active judges of this Court having voted in favor of granting rehearing in banc and it appearing that no issues have been presented which have not previously been considered by the Court,

Appellant's petition for rehearing is denied.

Entered by order of the Court.

CARL W. REUSS
Clerk